IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Private (E-2)	)	Crim. App. Dkt. No. 20140766
JEFFRY A. FELICIANO, JR.,	)	
United States Army,	)	USCA Dkt. No. 17-0035/AR
Appellant	)	

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Granted Issues

I. WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO INSTRUCT THE PANEL ON THE DEFENSE OF VOLUNTARY ABANDONMENT, AND IF SO, WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

II. WHETHER THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE PANEL THAT APPELLANT'S MISTAKE OF FACT AS TO CONSENT MUST BE BOTH HONEST AND REASONABLE, AND IF SO, WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Statement of the Case

On December 5, 2016 this Honorable Court granted appellant's petition for review. On January 4, 2017, appellant filed his final brief with this Court. The government responded on February 1, 2017. This is appellant's reply.

Argument

A. The government's voluntary abandonment argument conflates the standard of "some evidence" requiring an instruction with the guilty plea standard of whether evidence has raised a "substantial inconsistency".

A military judge has a *sua sponte* duty to instruct on a defense when "some evidence, without regard to its source of credibility has been admitted upon which members might rely if they choose." *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988). The government correctly identifies this legal standard. (Appellee's Br. 8). However, each of the cases in support of the government's argument is a guilty plea about whether the evidence presented raised a substantial inconsistency with an appellant's pleas of guilty. (Appellee's Br. 9-10) (citing *United States v. Schoof*, 37 M.J. 96, 104 (C.M.A. 1993); *United States v. Rios*, 33 M.J. 436, 440 (C.M.A. 1991); and *United States v. Smauley*, 42 M.J. 449, 451 (C.A.A.F. 1995)). While these cases certainly inform the substantive law regarding voluntary abandonment, the government ignores the functional difference between a military judge at a guilty plea and a panel in a contested court-martial within these standards.

A military judge's duty at a guilty plea is to ensure there is an adequate basis in law and fact to support the plea and that an accused is making a knowing, intelligent, and conscious waiver of his rights. *See generally United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008); *United States v. Care*, 40 C.M.R. 247

(C.M.A. 1969). The appellate standard requiring a substantial inconsistency for a guilty plea affords deference to an accused's plea and a military judge's acceptance of that plea because of the human tendency to justify one's own misbehavior. *See United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (citing *United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987)(Cox, Judge concurring)).

Unlike the deference of requiring a "substantial inconsistency" in a guilty plea, the standard triggering a mandatory instruction of "some evidence" is much lower because "Congress confid[ed] fact-finding power exclusively to the members of a panel." *United States v. Evans*, 38 C.M.R. 36, 40 (C.M.A. 1967). In a contested case, it is the members who must make credibility determinations, find the facts, and apply those facts to the law. *Id.* A panel cannot do this if they are not properly instructed. *Id.* "[W]hen the [military judge] or appellate bodies, understandably or not, invade the province of the fact finders, and deny instruction on that basis, reversal will inevitably come." *Id.* The standard of "some evidence" vests the panel with the tools necessary to render a decision and recognizes it is their responsibility to determine credibility and the facts before them.

The government's comparisons of the instant case to *Schoof, Rios*[1], and *Smauley* highlight their misunderstanding of the applicable standard. The

[1] As part of its comparison, the government asserts appellant's voluntary abandonment was incomplete because "some years" later he attempted to sexually assault SPC SE under similar circumstances. This assertion facially lacks merit and

government's analysis uses terms such as "the record indicates," "supports the inference," and "foreclosed the possibility of a defense." (Appellee's Br. 10-11). Indications, inferences, and possibilities are the proper determinations of the factfinder. Within the context of a guilty plea such evidence may inform an appellate court that seemingly contradictory minimizations do not constitute a substantial inconsistency. However, within the context of a contested court-martial they do not negate the triggering mechanism of "some evidence."

Here, Mr. RS admitted appellant was pretty drunk that evening. (R. at 484). Mr. RS testified that once Mr. RS got appellant's attention and highlighted that what appellant was about to do was not right and could get him in trouble for rape, appellant voluntarily got off of Ms. KLF on his own. (R. at 476, 496). This is "some evidence" upon which members could have relied for the panel to have attributed the cause and reason for appellant getting up off of Ms. KLF to be a complete and voluntary abandonment of the intended crime. Thus, failure to give the voluntary abandonment instruction was error as it precluded the panel from assessing this evidence and applying it against the law.

The government similarly confuses the standard for prejudice within its analysis, arguing, "Based on the circumstances it is reasonable to believe that

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both ignores the defense's alibi to the asserted evidence and that appellant was acquitted of the specifications against SPC SE. (JA 159-163).

Appellant would not have stopped sexually assaulting [Ms. KLF] without the intervention of [Mr. RS]." (Appellee's Br. 12). First, appellant never sexually assaulted Ms. KLF and was only charged with attempt. Second, regardless of whether it is reasonable to believe that appellant would not have stopped his attempt, the government's burden is much higher than showing a reasonable belief in its theory. Rather the government is charged with showing "beyond a reasonable doubt that the error complained of did not contribute to the defendant's conviction or sentence." *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F 2016).

Here the government's case was not overwhelming. There was no physical evidence. Every aspect of the specifications was highly contested and the complete defense of voluntary abandonment was not mutually exclusive with any other defense. A rationale panel could have found that appellant voluntarily abandoned the intended crime solely because it was wrong. Therefore, the government cannot prove that the military judge's failure to instruct on this defense did not contribute to the verdict for both specifications of Charge I.

B. "Lack of Consent" is an element of both forms of the underlying aggravated sexual assault charged as an attempt and as such the specific intent to commit such an attempt attaches to this element.

The government concedes, "the 'specific intent' in an attempt under Article 80, UCMJ, 'is the attempt to commit the *proscribed act*." (Appellee's Br. 15) (citing *United States v. Foster*, 14 M.J. 246, 249 (C.M.A. 1982). A *proscribed act* by its

very definition consists of all of the elements of an offense. "Lack of consent" is an element of both forms of the underlying aggravated sexual assaults charged in Specifications 1 and 2 of Charge I. Thus, the government was required to prove that appellant specifically intended to commit the sexual act *without consent*. As such, the proper mistake of fact instruction was that appellant's mistake need only be honest, rather than honest and reasonable.

The government argues that Congress changed Article 120, UCMJ, such that "'lack of consent' is no longer a necessary element to which the specific intent of an attempted aggravated sexual assault must attach." (Appellee's Br. 18). The government refers to lack of consent as merely an "attendant fact and circumstance," a "circumstantial fact," "circumstances under which the crime is committed," and a "potential subsidiary fact," suggesting that because Congress labeled consent and mistake of fact as to consent as affirmative defenses, lack of consent is no longer an element of the offense. (Appellee's Br. 15-19).

However, the government's reliance on *United States v. Neal*, 68 M.J. 289 (C.A.AF. 2010), is misplaced because *Neal* is readily distinguishable. *Neal* addressed consent in relation to aggravated sexual contact by force and focused on the "force" applied by an accused, not the mental state of the alleged victim. *Id.* at 303. Unlike in *Neal*, here, the burden to prove "lack of consent" beyond a

reasonable doubt for both forms of the underlying aggravated sexual assaults remained on the government.

In Specification 1, the government charged appellant with an attempted violation of Article 120(c)(2)(A), UCMJ, requiring the government prove Ms. KLF was substantially incapable of appraising the nature of the sexual act. (Charge Sheet). The unconstitutional burden shift contained within the interplay of Article 120(c)(2), (t)(14), and (t)(16), UCMJ, required that the government prove lack of consent beyond a reasonable doubt. *See United States v. Prather*, 69 MJ 338, 343 (C.A.A.F. 2011). "If an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent which logically results in the accused having disproven an element of the offense…" *Id.* "[A]n affirmative defense may not shift the burden of disproving any element of the offense to the defense." *Id.* (citing *Martin v. Ohio*, 480 U.S. 228, 233 (1987) and *Patterson v. New York*, 432 U.S. 197, 207 (1977)). As in *Prather*, here, lack of consent is an element of the underlying offense contained in Specification 1.

In Specification 2, the government charged appellant with an attempted violation of Article 120(c)(1)(B), UCMJ, requiring the government prove appellant caused bodily harm. (Charge Sheet). The statute defines "bodily harm" as "any offensive touching of another, however slight." Article 120(t)(8), UCMJ. Unlike the focus of the offense in *Neal* on the "force" applied by an accused, the definition

of "bodily harm" under Article 120(c)(1)(B), UCMJ, focuses on the mental state of the alleged victim because lack of consent is what makes the touching offensive. *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000); *United States v. Greaves*, 40 M.J. 432, 433 (C.M.A. 1994). Just as in the offense of assault consummated by a battery, although labeled an affirmative defense, the burden to prove "lack of consent" in relation to an "offensive touching" remains on the government, making it an element of the offense. *See generally United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F 2016) (citing *Johnson*, 54 M.J. at 69 n. 3)

The same interplay at issue in *Prather* is present in Article 120(c)(1)(B), UCMJ, such that if an accused proves a victim consented, he has necessarily proven that the touching was not offensive, which logically results in an accused having disproven an element. *Prather*, 69 M.J. at 343. As in *Prather*, an affirmative defense may not shift the burden of disproving any element of the offense to the defense. *Id.* Thus, "lack of consent" within the context of Article 120(c)(1)(B), UCMJ, also remains an element of the offense and was an element of the underlying aggravated sexual assault contained within Specification 2.

As an element of the proscribed act, in order to prove an attempt under both versions of the alleged aggravated sexual assault, the government was required to prove not only that appellant had the specific intent to commit the *actus reus,* or sexual act, but that he also had the specific intent to commit the intended act

without consent. *See generally United States v. Thomas*, 32 C.M.R 278, 291 (1962); *United States v. Langley*, 33 M.J. 278, 282 (C.M.A. 1991), and *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998).

The proper mistake of fact instruction was therefore that appellant's mistake need only be honest, and the military judge's instruction constituted error. The government cannot prove that the military judge's erroneous instruction was harmless beyond a reasonable doubt as it lowered the government's burden of proof. *See United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001).

Lastly, the government's argument that the same standard of general intent should apply to an attempt of Article 120, UCMJ, because of Congress's "intent to impose a reasonableness standard to any mistake of fact as to consent in regards to sexual assault offenses" is unpersuasive. (Appellee's Br. 20).[2] If anything, the continued substantive Congressional modifications of Article 120, UCMJ, suggest that if Congress had wished to change the specific intent requirement of an attempted Article 120 offense, they would have explicitly done so.

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[2] The government also misrepresents appellant's argument and states "As appellant concedes, if he had completed his underlying offense of aggravated sexual assault here, no specific intent would be required and any mistake of fact as to consent would have to be both honest and reasonable to constitute a defense to his crime." (Appellee's Br. 13). Appellant made no such concession, and merely acknowledged "While the underlying offense of aggravated sexual assault *may* not have a specific intent, the crime with which appellant was charged required the government prove appellant actually intended to commit this crime." (Appellant's Br. 16) (emphasis added).

The government complains of "absurd results" that are no more absurd than the established case law regarding attempted murder. *United States v. Roa*, 12 M.J. 210, 212-13 (C.M.A. 1982) (stating the specific intent requirements of attempt means that the crimes denounced in Articles 118(2), 118(3) and 119(b)(1) cannot support respective charges of attempted murder and involuntary manslaughter by culpable negligence). If indeed Congressional changes reduced the alleged forms of aggravated sexual assault to mere culpable negligence, as the government appears to contend, the specific intent requirement of an attempt offense means such allegations cannot support an Article 80, UCMJ, offense. *Id.*

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court dismiss the findings of guilty to Charge I and its specifications.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Feliciano*, Army Dkt. No. 20140766, USCA Dkt. No. 17-0035 /AR, was electronically filed with the Court and Government Appellate Division on February 13, 2017.

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